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No. 87-2126

Supreme Court, U
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IN THE

Supreme Court of the United S

October Term, 1988

STAR COLOR PLATE SERVICE,
DIVISION OF EINHORN ENTERPRISES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err by ruling that an employer must bargain with a union that has been certified as bargaining representative after winning an election notwithstanding a delay between the election and the certification, where that delay is the result of protracted litigation occasioned by the employer's numerous unfair labor practices, attempt to pack the bargaining unit with new anti-union employees, and instigation of non-employees, supervisors and other persons clearly not within the bargaining unit to vote?

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STATEMENT OF THE CASE

Intervenor, Local One, Amalgamated Lithographers of America (the "Union") submits this Brief in opposition to the Petition by Star Color Plate Service (the "Employer") for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued on March 30, 1988, which decision enforced the prior order of the National Labor Relations Board (the "Board") dated November 24, 1986.

Eight years ago, on August 29, 1980, the Union filed a representation petition with the Board, in which it sought to represent the lithographic production employees at the Employer's Jamaica, New York factory. The Union won a majority of the votes cast at the March 31, 1981 representation election conducted by the Board. The Employer's position is that although the Union's victory in the election has withstood seven years of litigation, that victory should be treated as a nullity *because* seven years of litigation have been required to uphold it. The Court of Appeals rejected this cynical argument and this Court should not dignify it with a hearing.

First, even before the election was held, the Employer opposed the lithographic production bargaining unit for which the Union petitioned arguing, *inter alia,* that four owners of the Employer, as well as truck drivers, one messenger and a clerical employee should be entitled to vote. After a hearing, the Board specifically rejected these claims, and directed a representation election which was conducted on March 31, 1981.[1]

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1. The Employer committed numerous unfair labor practices during the organizing campaign, including layoffs of union supporters, discriminatory work assignments and disciplinary practices, withdrawal of privileges, and denials of training to Union supporters. The Administrative Law Judge later found that the Employer had committed numerous violations of the National Labor Relations Act (the "Act"), which finding was upheld by the Board.

There were about eleven lithographic production employees who were eligible to vote in the election. On the day of the election, however, the Employer enlisted fourteen additional persons—four non-employees, four of its supervisors, two irregular part-time employees, and four employees not in the bargaining unit to attempt to vote in a transparent effort to prevent a legitimate, fair election from taking place. Seven of the fourteen had already been specifically ruled outside the unit by the Regional Director following the pre-election hearing. These seven included the four owners of the Employer, who proceeded to vote in the election in spite of the clear prior ruling that they were not entitled to do so!

The tally of the eleven unchallenged ballots showed that a 6-5 majority had been cast in favor of the Union.[2]

The Union challenged the ballots of the fourteen other persons put forward by the Employer. The Union could not permit the challenged ballots to be opened since the people who cast them had been presented by the Employer and their ballots almost certainly were cast against the Union. On June 30, 1981, the Regional Director sustained the Union's challenges to the ballots of the seven employees whom he had previously ruled were outside the unit and directed an administrative hearing for the seven other challenges. The ballot challenges were consolidated for hearing with the numerous charges of unfair labor practices filed by the Union against the Employer as a result of its unlawful pre-election activities. After a thirteen day hear-

2. Five votes were cast for Local 363, International Brotherhood of Teamsters and no votes were cast for no union.

ing on all of the unfair labor practice charges and the ballot challenges, the Administrative Law Judge issued his opinion on March 17, 1983 ("ALJ Opinion"), finding not only that the Employer had committed numerous acts of unlawful discrimination against Union supporters during the organizing campaign, but more importantly, sustaining the Union's challenges to the remaining seven ballots on the grounds that the Employer had deliberately packed the bargaining unit with anti-Union employees in order to dilute the Union's strength in the election. The decision stated that

> . . . the entire system of operations at [Employer's] plant drastically changed subsequent to the initiation of the representation petition of Petitioner. The Employer sought every means at its disposal to deprive its unit employees of representation by Petitioner. The hiring of the six part-time employees in October and November, 1980, as well as the hiring of Frayne, a former employee, was effectuated by Star Color to "pack the unit" in order to insure that Petitioner would not be successful in its organizational efforts. . . .

ALJ Opinion at 46. As for the ballots cast by the Employer's four owners, the ALJ Opinion states:

> I cannot find any justification for Respondent's position in having the four supervisors . . . presenting themselves at the polls to vote after the Regional Director had decided . . . that these four were owners and supervisors. . . . the only explanation I can conceive of for this action by Respondent is to hinder and frustrate at every opportunity the wishes of its unit employees.

ALJ Opinion at 44-45 (Emphasis supplied). The Employer filed extensive exceptions to the ALJ Opinion with the Board. An April 28, 1986, the Board denied all of the Em-

ployer's exceptions, including those concerning the extra ballots, and certified the Union as bargaining representative. 279 NLRB No. 82.

The Employer, however, had not yet exhausted its delaying tactics. When the Union requested collective bargaining negotiations, the Employer refused. Instead, the Employer filed a motion on May 20, 1986 for reconsideration of the Board's decision and for leave to reopen the record for the insertion of additional evidence on the challenged ballots. On June 18, 1986, the Board denied the Employer's motion. Upon an unfair labor practice charge filed by the Union, the Board issued a complaint on June 24, 1986 alleging that the Employer had unlawfully refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act. On November 24, 1986 the Board granted summary judgment on the complaint and ordered the Employer to commence bargaining. 282 NLRB No. 31. (App. at C-1).[3]

When the Employer continued to refuse to bargain, the Board sought enforcement of its Order at the Second Circuit. The Employer argued before the Court of Appeals that the lengthy delay between the election and the issuance of the bargaining order made that bargaining order an inappropri e remedy, and that alternatively the Court should have remanded the case to the Board for a determination of the question of whether the passage of time rendered the bargaining order inappropriate. The Court rejected these claims and enforced the Board's Order. *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507. (App. at A-1).

3. References denoted "App." are to the Appendix to the Petition for Certiorari submitted to this Court by the Employer.

ARGUMENT

I. PETITIONER HAS FAILED TO ASSERT GROUNDS SUFFICIENT TO WARRANT THE GRANT OF CERTIORARI.

Based on this Court's requirements for the granting of a writ of certiorari, the Employer has woefully failed to set forth grounds for the Court to take up this case.

The Court should exercise its discretion to grant review of a decision of a court of appeals on writ of certiorari "only when there are special and important reasons therefor." S.Ct.R. 17.1. The writ of certiorari is proper where the case raises an important question of federal law which has not been, but should be, settled by the Supreme Court. *Nixon* v. *Fitzgerald,* 457 U.S. 731 (1982); *Couch* v. *United States,* 409 U.S. 322 (1973); *Tidewater Oil Co.* v. *United States,* 409 U.S. 151 (1972).

Supreme Court review may also be appropriate when a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same issue. *See National Association of Greeting Card Publishers* v. *United States Postal Service,* 462 U.S. 810 (1983); *NLRB* v. *Savair Manufacturing Co.,* 414 U.S. 270 (1973); *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195 (1962). Minor inconsistencies among the circuits, however, do not warrant review on certiorari. Certiorari should be granted only when the case involves principles the settlement of which are important to the public, and where there is a "real and embarrassing conflict" between the courts of appeals.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it

> may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice v. *Sioux City Memorial Parks Cemetery,* 349 U.S. 70 (1950) (writ of certiorari dismissed as improvidently granted) (citations omitted).

As will be set forth in greater detail *infra,* the Employer has utterly failed to allege any grounds remotely sufficient to warrant issuance of a writ of certiorari. The issues of law raised by the Employer have been settled long ago by this Court and the courts of appeals, and the supposed conflict between circuit courts asserted by the Employer is nonexistent in this case.

Accordingly, the Court should deny the petition for certiorari.

II. THE PETITION RAISES NO ISSUES WHICH HAVE NOT BEEN CLEARLY RESOLVED BY THE FEDERAL COURTS.

The Employer argues that the passage of time between the Union's victory in the election and the Board's certification of the Union as bargaining representative renders the bargaining order an inappropriate remedy, since there was significant turnover in the employee complement during that period. The Employer contends that issunace of an order requiring the Employer to bargain with the Union would frustrate the policies of the Act in view of the fact that most of the employees currently in the bargaining unit were not employed by the Employer at the time of the elec-

tion. Review of relevant cases makes clear that neither this Court nor the circuit courts share the Employer's view of the Act, and that the Employer's claim is plainly without merit.

This Court has made the law quite clear concerning the extent of the Employer's duty to bargain with a union which has been certified by the Board following a representation election. In *Brooks* v. *NLRB*, 348 U.S. 96 (1954) the Court held that such a union has an irrebuttable presumption of majority status for a one year period following the date of certification regardless of whether it has maintained majority status. This Court has continued to rely on *Brooks* and to cite it with approval. *See, e.g., NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 197, 208 (1986), *NLRB* v. *Burns International Security Services, et al.*, 406 U.S. 272, 279 n.3 (1972); *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 599 n.14 (1969).

The Board has routinely with this Court's approval extended the certification year as the remedy for an 8(a)(5) violation. *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702 (1944); *NLRB* v. *Accurate Web, Inc.*, 818 F. 2d 273, 275 (2d Cir. 1987); *Glomac Plastics, Inc.* v. *NLRB*, 592 F.2d 100, 101 (2d Cir. 1979). Typically, in extending the certification year, the Board orders that the year will commence when good faith bargaining begins. *Mar Jac Poultry Co.*, 136 NLRB 785 (1962); *NLRB* v. *Lee Office Building*, 572 F.2d 704, 707 (9th Cir. 1978). After the certification year, the presumption of a union's majority status is rebuttable, and only then may an employer refuse to bargain with the union based on a good faith doubt of the union's continued majority status.

In the present case, there has been no bargaining between the Employer and the Union at any time. Accordingly, the Board's bargaining order extended the certification year, and directed that it begin to run following the commencement of bargaining. (App. at C-8, 9). Thus, *assuming arguendo* that the Union has in fact lost its majority status, the Employer may not refuse to bargain based on the good faith doubt doctrine for one full year after the commencement of bargaining.

The Employer appears to acknowledge these basic principles of labor law, but argues that "special circumstances" prevent their application to this case. The Employer claims that the six year delay prior to certification and the high turnover among bargaining unit employees excuse it from normal bargaining obligations during the certification year.[4]

Both the Ninth and Second Circuit courts have specifically rejected the Employer's argument prior to its rejection by the Second Circuit in this case. In *NLRB* v. *Best Products Co., Inc.*, 765 F.2d 903 (9th Cir. 1985), an employer claimed that a bargaining order should not be enforced due to high employee turnover and a time delay of about two years between the election and the certification. As in the

4. While the Board and reviewing courts have recognized unusual circumstances sufficient to permit an Employer to withdraw recognition during the certification year, such cases have been limited to two types: (a) a schism within or dissolution of the certified union, and (b) radical fluctuation in the size of the bargaining unit within a short period of time. The Board and reviewing courts have continued to construe this exception narrowly. *See, e.g. Airport-Shuttle Cincinnati Inc.*, 257 NLRB 955 (1981) (Union's "total inactivity" following its certification coupled with a "disaffection petition" signed by 70% of bargaining unit employees is *not* unusual circumstances).

instant case, the Board included in the bargaining order an extension of the certification year so that it would begin to run on the date of the first bargaining session. In rejecting the Employer's claim of special circumstances, the Ninth Circuit Court of Appeals stated that:

> the certification year has not yet begun to run here, since the Board ordered that the period of certification would begin on the date that Best commences good faith bargaining . . . It is thus immaterial whether there has been great employee turnover or a significant lapse of time since the election. The beginning of the irrebuttable presumption may properly run from the date of [the bargaining order] until one year after Best complies with the Board bargaining order's command to negotiate in good faith.

765 F.2d at 914.

In *NLRB* v. *Patent Trader*, 426 F.2d 791 (2d Cir. 1970), the Court of Appeals for the Second Circuit, sitting *en banc*, rejected an employer's argument that time delays between the certification and the Board's finding of an unlawful refusal to bargain by the employer required that a new election rather than an order directing bargaining was the appropriate remedy. The Court stated that "[t]he basic point is that it is an error to refuse to enforce a bargaining order when it is conceded that there has been a Board election, the Union was duly certified, and the Company thereafter refused to bargain in good faith." *Id.* at 792. The Court noted that a Board-supervised election had already been held, and that, "[t]he choice here is not between a bargaining order or an election in the first instance, but between requiring two Board elections rather than just the

one already held." *Id.* The Second Circuit has continued to follow the *Patent Trader* analysis and to cite with approval to its ruling. *See Glomac Plastics, Inc.* v. *NLRB*, 592 F.2d 100 (2d Cir. 1979); *NLRB* v. *All Brand Printing Corp.*, 594 F.2d 926 (2d Cir. 1979); *NLRB* v. *Windsor Industries, Inc.*, 730 F.2d 860, 865, n.1 (2d Cir. 1984).

The Employer has cited no case in which a court accepted its argument that the passage of time makes a bargaining order an inappropriate remedy for a refusal to bargain. Nor does any such case exist. Indeed, the Employer's argument was essentially disposed of by this Court's holding in *Brooks* in 1954. Acceptance of the Employer's logic would stand the Act on its head. As the Second Circuit has noted in this case, if the passage of time provided a basis for an employer to refuse to bargain following a certification, then employers would be encouraged to engage in unlawful conduct so that litigation of that conduct before the Board might result in the requisite delay. Excusing an employer's bargaining obligations due to delay caused by litigation of employer unfair labor practices would reward the employer for committing those unfair labor practices, a comical result antithetical to the basic policies of the Act. Indeed, the record in this case makes it clear that *this* Employer is singularly undeserving of such a windfall, as it had no reservations about committing brazen and numerous unfair labor practices to disrupt the election and to forestall its bargaining obligation. *See supra* at 1-4. What an injustice it would be if the Court excused this Employer's bargaining obligation!

III. PETITIONER HAS ALLEGED NO SIGNIFICANT CONFLICT BETWEEN THE COURTS OF APPEALS.

The Employer also suggests that the Court of Appeals should have remanded this matter to the Board for a determination of whether the passage of time rendered a bargaining order inappropriate. The Employer now claims to this Court that the First Circuit would have so remanded this case, and that accordingly a conflict exists between the First Circuit and the Second and Ninth Circuits that requires this Court's intervention. Closer examination of the relevant cases and the record in this case reveals that no such conflict exists.

Moreover, minor inconsistencies between circuit courts do not provide a basis for granting the writ of certiorari. A conflict between circuits must be "real and embarrassing" to warrant redress by the Court. *Rice* v. *Sioux City Memorial Parks Cemetery, supra.* Even if the purported conflict did exist its magnitude and significance would be well short of the required standard.

In *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), and *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982), the court enforced the Board's bargaining orders but remanded to the Board to determine whether the passage of time rendered a bargaining order inappropriate.[5]

5. In *Hood,* the Court ruled that a union was not disqualified from representing employees of a milk distributor because of an alleged conflict of interest arising from loans to a competing milk distributor by a pension fund affiliated with the union. The Court withheld entry of judgment for sixty days so that the Board could consider whether the order "remains appropriate." In *St. Regis Paper,* the Employer had moved the location of its facility after the Board issued the bargaining order and prior to the Court's ruling. The Court enforced the Board's order and remanded the case to the Board to consider whether the bargaining order remained appropriate.

If the First Circuit's election to remand those cases following its enforcement of the Board's orders might ever raise a conflict between circuit courts sufficient to warrant this Court's review on certiorari, it plainly does not do so in this case. The First Circuit cases are readily distinguishable from this case. In this case the Board had *already* expressly addressed and rejected the Employer's claim that the passage of time made a bargaining order inappropriate. The Board did so in its Order of November 24, 1986 (App. at C-6)—the very Order on which it sought the Court's enforcement! Indeed, the *only* proceeding subsequent to this determination by the Board was the appeal to the Court of Appeals. Accordingly, the Court of Appeals noted that remand to the Board for a ruling on a question on which it had just ruled in this case would be an "idle and useless formality" *citing NLRB* v. *Wyman-Gordon, Co.* 394 U.S. 759, 766 n.6 (1969). In the First Circuit cases cited by the Employer, the Board had not yet addressed the issue remanded to it. Thus, the instant case does not present the question presented in *Hood* and *St. Regis,* and the Court of Appeals' ruling here creates no conflict with those decisions. Accordingly, no basis for issuance of the writ of certiorari exists.

CONCLUSION

Based on the foregoing, the Union respectfully requests that the Court deny the petition for a writ of certiorari in its entirety.

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Respectfully Submitted,

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